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PROCUREMENT

# Draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction

## *Note by the Secretariat*

1. While preparing the UNCITRAL Model Law on Procurement of Goods and Construction, the Commission was of the view that background and explanatory information on the Model Law in the form of a guide to enactment would provide useful assistance to executive branches of Governments, and to legislatures using the Model Law. Accordingly, the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393) was adopted by the Commission at its twenty-sixth session simultaneously with the adoption of the Model Law (Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), para. 258)).

2. In reviewing the amendments and additions that should be made to the UNCITRAL Model Law on Procurement of Goods and Construction so as to encompass procurement of services, the Working Group on the New International Economic Order noted the added importance of the Guide to Enactment in view of inclusion of provisions on procurement of services, in particular since this was an area in which many legislatures and Governments had relatively limited experience. The Working Group expressed the hope that the amended Guide to Enactment would be adopted simultaneously with the amended Model Law (A/CN.9/392), para. 132). In line with that objective, the present note sets forth in the annex the draft amendments to the Guide to Enactment geared to the text of the draft Model Law on Procurement of Goods, Construction and Services as established by the Working Group upon conclusion of its seventeenth session and set forth in the annex to the report of that session (A/CN.9/392).

3. As, in line with applicable directives on limitation of documentation, it was not feasible to reprint the entire Guide, this note only presents the draft amendments and additions that are to be made to the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393). In instances where only minor changes are to be made, the words to be added or amended are indicated. In addition, it may be noted that, as appropriate, the final amendments to the Guide will include the replacement of the words "goods or construction" by the words "goods, construction or services". Where the amendments or additions are substantial, the entire new passage is provided. As was the case with the adoption of the Guide at the twenty-sixth session, once the Commission has completed its review and adoption of the Model Law on Goods, Construction and Services at the twenty-seventh session, it might be left to the Secretariat to finalize the Guide to take account of the deliberations and decisions in the Commission.

Annex

Draft amendments to the Guide to Enactment of
UNCITRAL Model Law on Procurement of Goods and Construction

INTRODUCTION

1. Replace paragraph 1 by the following:

"1. At its nineteenth session, in 1986, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work in the area of procurement. The UNCITRAL Model Law on Procurement of Goods and Construction, and its accompanying Guide to Enactment, were adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993). The Model Law is intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists. The text of the Model Law on Procurement of Goods and Construction is set forth in annex I to the report of UNCITRAL on the work of its twenty-sixth session (Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)).

"1 bis. On the understanding that certain aspects of the procurement of services were governed by different considerations from those that governed the procurement of goods or construction, a decision had been made to limit the work at the initial stage to the formulation of model legislative provisions on the procurement of goods and construction. At the twenty-sixth session, having completed work on model statutory provisions on procurement of goods and construction, the Commission decided to proceed with the elaboration of model statutory provisions on procurement of services. Accordingly, at the twenty-seventh session (New York, 31 May-17 June 1994), the Commission adopted amendments to the Model Law on Procurement of Goods and Construction so as to encompass procurement of services and adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter referred to as the "Model Law"). The text of the Model Law is set forth in annex I to the report of UNCITRAL on the work of its twenty-seventh session (Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)). At the same session, the Commission also adopted the present Guide as a companion to the Model Law."

2. Paragraph 6:

In the penultimate sentence, after the words "for exceptional cases" add the words "in the case of goods or construction, or other than request for proposals for services in the case of services".

I. MAIN FEATURES OF THE MODEL LAW

3. Replace paragraph 10 by the following:

"10. To take account of certain differences between the procurement of goods and construction and the procurement of services, the Model Law sets forth in chapter IV bis a set of procedures especially designed for the procurement of services. The main differences referred to above in paragraph 1 bis arise from the fact that, unlike the procurement of goods and construction, procurement of services typically involves the supply of an intangible commodity whose quality and exact content may be difficult to quantify. The precise quality of the services provided may be largely dependent on the skill and expertise of the suppliers or contractors. Thus, unlike procurement of goods and construction where price is the predominant criterion in the evaluation process, the price of services is often not

considered as important a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors. Chapter IV bis is intended to provide procedures that reflect these differences."

4. Replace paragraph 13 with the following text:

"13. The Model Law presents several procurement methods so as to enable the procuring entity to deal with the varying circumstances that it might encounter. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances in procurement of goods or construction, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble. For normal circumstances in the procurement of services, the Model Law prescribes the use of request for proposals for services so as to give due weight in the evaluation process to the qualifications and expertise of the service providers. For the exceptional circumstances in which tendering is not appropriate or feasible for procurement of goods or construction, the Model Law offers other methods of procurement; and it also does so for the circumstances in which request for proposals for services is not appropriate or feasible for procurement of services."

5. Add a paragraph 14 bis as follows:

"Request for proposals for services

14 bis. Since request for proposals for services is the method of procurement to be used in typical circumstances in the procurement of services, chapter IV bis contains procedures that promote competition, objectivity and transparency, while taking account of the predominant importance of the qualifications and expertise of the service providers in the evaluation process. The main features of request for proposals for services include, for example, unrestricted solicitation of suppliers and contractors as the general rule, and predisclosure in the request for proposals of the criteria for evaluation of proposals and, of the three optional selection methods, the one that will be used in the selection process. According to the first method, which is set forth in article 41 sexies (12) and which is akin to tendering in that there is no negotiation, the procuring entity subjects proposals that obtain a technical rating above a set threshold to a straightforward price competition. The second option (article 41 sexies (13)) provides a method by which the procuring entity negotiates with suppliers and contractors, after which they submit their best and final offers, a process akin to the request for proposals procedure in article 39. Under the third method (article 41 sexies (14)), the procuring entity holds negotiations solely on price with the supplier or contractor who obtained the highest technical rating."

6. Paragraph 15:

(i) In the first sentence, after the words "for cases", add the words " in the procurement of goods and construction,".

(ii) After the first sentence, add the following: "Those of the three procurement methods provided for in article 17 that have been included by the enacting State in its law might also be used for procurement of services. However, for one of these other methods to be used, the condition for its use would have to be present."

7. Paragraph 19:

After the words "standardized goods", add the words "or services".

8. Paragraph 21:

After the words "tendering proceedings", add the words "or request for proposals for services".

9. Paragraph 23:

(i) In the first sentence, replace the words "in article 32(4)(d)", by the words "in articles 32(4)(d) and 41 quater (2)".

(ii) In the third sentence, where the word "tender" appears, add the words "or proposal".

10. Paragraph 24:

In the first sentence, after the words "engaging in tendering", add the words "or request for proposals for services".

11. Paragraph 25:

In the first sentence, after the words "other than tendering", add the words "or request for proposals for services".

## II. ARTICLE-BY-ARTICLE REMARKS

## CHAPTER I. GENERAL PROVISIONS

### Article 2. Definitions

12. Replace paragraph (3) with the following:

"3. Editorial language has been included at the end of the definitions of "goods" and of "services" in subparagraphs (c) and (d bis) indicating that a State may wish to specifically refer in those definitions to categories of items that would be treated as goods or services, as the case may be, and whose status might otherwise be unclear. The intent of this technique is to provide clarity with respect to what is and what is not to be treated as "goods" or "services" and it is therefore not meant to be used to limit the scope of application of the Model Law, which can be done by way of article 1(2)(b). Such an added degree of specificity might be considered desirable by the enacting State, in particular in view of the open-ended definition of services."

### Article 4. Procurement regulations

13. Paragraph 2:

After the words "method other than tendering", add the words "or request for proposals for services".

14. Paragraph 3:

After the reference to article 32(4)(d), add a reference to article 41 quater (2).

Article 7. Prequalification proceedings

15. Paragraph 1:

In the last sentence, after the word "tender", add the words "or proposal", and after the word "tenders", add the words "or proposals".

Article 11. Record of procurement proceedings

16. Paragraph 1:

At the end of the paragraph add the following sentence: "The rationale behind limiting disclosure of information required to be disclosed under article 11 (1)(d) to that which is known to the procuring entity is that there may be procurement proceedings in which all proposals would not be fully developed or finalized by the proponents, in particular where all the proposals did not survive to the final stages of the procurement proceedings. The reference in this paragraph to "a basis for determining the price" is meant to reflect the possibility that in some instances, particularly in procurement of services, the tenders, proposals, offers or quotations would contain a formula by which the price could be determined rather than an actual price quotation."

17. Make the following changes after the comments on article 11:

(i) Add the title "Article 11 bis. Rejection of all tenders, proposals, offers or quotations" and place the comments on article 33 (as amended by (ii) hereunder below this title).

(ii) In every instance after the word "tenders", add the words "proposals, offers or quotations".

(iii) Add the following text:

"Article 11 ter. Entry into force of the procurement contract

Article 11 ter is included because, from the standpoint of transparency, it is important for suppliers and contractors to know in advance the manner of entry into force of the procurement contract. In the context of tendering, article 35 sets forth detailed rules applicable to the entry into force of the procurement contract, which is reflected in paragraph (1). However, no rules on entry into force of the procurement contract are provided for the other methods of procurement in view of the varying circumstances that may surround the use of other procurement methods and the procedurally less detailed treatment of them in the Model Law. It is expected that, in most instances, entry into force of the procurement contract for the other methods of procurement will be determined in accordance with other bodies of law, such as the contract or administrative law of the enacting State. In order to ensure an adequate degree of transparency, however, it is provided for those other methods that the procuring entity predisclose to the suppliers and contractors the rules that will be applicable to the entry into force of the procurement contract."

## CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

18. Replace the comments on article 16 with the following:

"1. Article 16 establishes the rule, already discussed in paragraph 13 of the Introduction to this Guide, that, for the procurement of goods or construction, tendering is the method of procurement to

be used normally, while request for proposals for services, as set out in chapter IV bis, is the method to be used normally for procurement of services. For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt to provide the best value, the Model Law provides a number of other methods of procurement. In the case of services, the procuring entity may use tendering where it is feasible to formulate detailed specifications and the nature of the services allow for tendering; otherwise it may use one of the other methods of procurement available under the Model Law if the conditions for its use are met."

"2. Article 16(4) sets forth the requirement that a decision to use a method of procurement other than tendering in the case of goods or construction, or, in the case of services, a method of procurement other than request for proposals for services, should be supported in the record by a statement of the grounds and circumstances underlying that decision. That requirement is included because the decision to use an exceptional method of procurement, rather than the method that is normally required (i.e., tendering for goods or construction, or request for proposals for services) should not be made secretly or informally."

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

19. Paragraph 1:

In the first sentence, after the words "other than tendering", add the words "or requesting for proposals for services".

20. Paragraph 2:

(i) After the words "to formulate specifications", add the words "for the goods or construction or, as the case may be, identify the characteristics of the services."

(ii) After the words "other than tendering", add the words "or request for proposals for services".

21. Add the following new text consequent to the addition to the Model Law of Chapter IV bis:

"CHAPTER IV BIS. REQUEST FOR PROPOSALS FOR SERVICES

Articles 41 bis to septies present the procedures for request for proposals for services, the procurement method normally to be used in procurement of services. Since, as noted in paragraph 10 of section I of this Guide, the main difference between procurement of goods and construction and procurement of services is in the evaluation and selection process, the features of chapter IV bis that differ most markedly from tendering are to be found in article 41 sexies on the selection procedures. Otherwise, the articles in this chapter, for example on solicitation of proposals and on contents of the request for proposals, generally parallel provisions on analogous points in Chapter III, on tendering proceedings. This is because tendering and request for proposals for services are the methods to be used in the bulk of procurement and, as such, are designed to maximize economy and efficiency in procurement and promote the other objectives set forth in the Preamble."

"Article 41 bis. Solicitation of proposals

1. In line with the objective of the Model Law of fostering competition in procurement, and since request for proposals for services is the main method for procurement of services, article 41 bis is

aimed at ensuring that as many suppliers and contractors as possible get the opportunity to become aware of procurement proceedings and to express their interest in participating in the proceedings. As is the case also in tendering proceedings, this is achieved by providing that the notice seeking expressions to participate should be publicized widely.

2. However, recognizing that in certain instances generally parallel to those reflected in the conditions for use of restricted tendering (article 18), the requirement of open solicitation might be unwarranted or might defeat the objectives of economy and efficiency, paragraph (3) sets out those cases where the procuring entity need not engage in open solicitation. The enacting State may wish to establish in the procurement regulations the value threshold below which procuring entities need not, in accordance with paragraphs (2) and (3) of the article, resort to open solicitation. In this regard, it may be noted that the level at which the threshold would be set for services might be lower than the level at which it would be set for goods and construction."

"Article 41 ter. Contents of request for proposals for services

1. Article 41 ter contains a list of the minimum information that should be contained in the request for proposals in order to assist the suppliers and contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. In view of the predominance as a procurement method of request for proposals for services, article 41 ter is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 25).

2. Paragraphs (h) and (i) reflect the fact that, in many instances of procurement of services, the full nature and characteristics of the services to be procured might not be known to the procuring entity. Since, as discussed in paragraph 10 of section I of this Guide, the proposal price might not always be a relevant criterion in the procurement of services, paragraphs (k) and (l) are only applicable if price is a relevant criterion in the selection process."

"Article 41 quater. Criteria for the evaluation of proposals

1. Article 41 ter sets out the permissible range of criteria that the procuring entity may apply in evaluating the proposals. As is the case elsewhere in the Model Law where such types of criteria are listed, the procuring entity is not required necessarily to apply each of the criteria in every instance of procurement. In the interests of transparency, however, the procuring entity is to apply the same criteria to all proposals and it is precluded from applying criteria that have not been predisclosed to the suppliers and contractors in the request for proposals.

2. In reflecting the importance of the skill and expertise of the suppliers and contractors in the bulk of the cases of procurement of services, paragraph (1) (a) lists as one of the criteria the qualifications and abilities of the personnel who will be involved in providing the services. This criterion would be particularly relevant in the procurement of those services that require a high degree of personal skill and knowledge on the part of the service providers, for example, in an engineering consultancy contract. By establishing the effectiveness of the proposal in meeting the needs of the procuring entity as one of the possible criteria, paragraph (1)(b) enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal.

3. Paragraphs (1) (d) and (e), and (2), are similar to provisions applicable to tendering by way of article 32(4)(c)(iii), (iv) and (d). The comments in this Guide on those provisions in the context of tendering (see paragraphs 3 to 6 of the comments on article 32) are therefore relevant to article 41 quater."

"Article 41 quinquies. Clarifications and modifications of request for proposals

Article 41 quinquies mirrors the provisions of article 26 on the analogous matter in the context of tendering and the comments in this Guide on article 26 are thus relevant to article 41 quinquies."

"Article 41 sexies. Selection procedures

1. Paragraph (1)(b) makes allowance for the use of an impartial panel of experts in the selection process, a procedure that is sometimes used by procuring entities, particularly in the adjudication of design contests or in procurement of services with a high artistic or aesthetic component. Enacting States using such panels may wish to provide further rules in the procurement regulations, with regard, for example, to any distinctions that would have to be drawn between panels whose role was merely advisory, panels whose role was limited to the aesthetic and artistic aspects of the proposals and panels empowered to make decisions that would bind the procuring entity.

2. In paragraphs (2), (3) and (4), three methods of selecting the successful proposal are provided so as to enable the procuring entity, within the context of a request for proposals for services-proceeding, to utilize a method that best suits the particular requirements and circumstances of each given case. The choice of a particular method is largely dependent on the type of services being procured and the main factors that will be taken into account in the selection process, in particular, whether the procuring entity wishes to hold negotiations with suppliers and contractors, and if so, at which stage in the selection process. For example, if the services to be procured are of fairly standard nature where no great personal skill and expertise is required, the procuring entity may wish to resort to the method of selection under paragraph (2), which is more price oriented and which, like tendering, does not involve negotiations. On the other hand, for services in which the personal skill and expertise of the supplier or contractor is a crucial consideration, the procuring entity may wish to resort to one of the methods in paragraphs (3) and (4), since they like tendering, permit greater emphasis to be placed on those criteria and provide for negotiation.

3. As mentioned above, the method provided for under paragraph (2) may be more compatible with the procurement of services where the price rather than the personal skill and expertise of the suppliers and contractors is the dominant consideration and the procuring entity does not wish to negotiate. However, to ensure that the suppliers and contractors possess sufficient competence and expertise, the Model Law provides that the procuring entity should establish a threshold level by which to measure the non-price aspects of the proposals. If this threshold is set at a sufficiently high level, then all the suppliers and contractors whose proposals attain a rating at or above the threshold can in all probability provide the services at a more or less equivalent level of competence. This allows the procuring entity to be more secure in selecting the winning proposal on the basis of price alone in accordance with paragraph (2)(b)(i), or, in accordance with paragraph (2)(b)(ii), on the basis of the best combined evaluation of price and non-price aspects.

4. Paragraph (3) sets forth a method of selection that is akin to the evaluation procedures for the request for proposals method under article 39. It is therefore best suited in those circumstances where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all suppliers and contractors, the procuring entity is able to clarify better what its needs are, which can be taken into account by suppliers and contractors when preparing their "best and final offers". Subparagraph (c) has been included in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal, including the evaluation of the competence of those who will be involved in providing the services.

5. A third procedure for selecting the successful proposal, one that also involves negotiations, and which traditionally has been widely used in particular in procurement of intellectual services, is set forth in paragraph (4). In this procedure, the procuring entity sets a threshold on the basis of the

quality and technical aspects of the proposals, and then ranks those proposals that are rated above the threshold, ensuring that the suppliers and contractors with whom it will negotiate are capable of providing the services required. The procuring entity then holds negotiations with those suppliers or contractors one at a time, starting with the supplier or contractor that was ranked highest in the procurement proceeding on the basis of their ranking until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains a fair and reasonable price for the services to be provided. The rationale for not providing the procuring entity with the ability to reopen negotiations with suppliers and contractors with whom it had already terminated negotiations is to avoid open-ended negotiations which could lead to abuse and cause unnecessary delay. However, although this has the benefit of imposing a measure of discipline in the procurement, it denies the procuring entity the opportunity to reconsider a proposal that subsequent negotiations with suppliers or contractors at a later stage would show to have been more favourable. This is an indication that this method of selection is not designed to provide as high a degree of competition as regards to price as the procuring entity may wish to have."

"Article 41 septies. Confidentiality

Article 41 septies is included because, in order to prevent abuse of the selection procedures and to promote confidence in the procurement process, it is important that confidentiality be observed by all parties especially where negotiations are involved. Such confidentiality is important in particular to protect any trade or other information that suppliers or contractors might include in their proposals and that they would not wish to be made known to their competitors."